No. 14-114

IN THE
Supreme Court of the United States

DAVID KING; DOUGLAS HURST;
BRENDA LEVY, ROSE LUCK,
Petitioners,

v.

SYLVIA MATHEWS BURWELL, as U.S. Secretary of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; JACOB LEW, as U.S. Secretary of the Treasury; UNITED STATES DEPARTMENT OF THE TREASURY; INTERNAL REVENUE SERVICE; and JOHN KOSKINEN, as Commissioner of Internal Revenue,
Respondents.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF *AMICI CURIAE* ADMINISTRATIVE & CONSTITUTIONAL LAW PROFESSORS IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*[1]

The *amici curiae* are professors of law who teach in the fields of Administrative Law and Constitutional Law, including Separation of Powers. They include Dr. John S. Baker, Professor Emeritus, Louisiana State University; Professor Marshall J. Breger, Columbus School of Law, The Catholic University of America; Professor Robert J. Delahunty, University of St. Thomas School of Law; Professor Antonio F. Perez, Columbus School of Law, The Catholic University of America; Professor Ronald D. Rotunda, Doy and Dee Henley Chair and Distinguished Professor of Jurisprudence, Chapman University Dale E. Fowler School of Law.

By filing this brief, your *Amici curiae* wish to highlight the critical role that this Court plays when it elaborates, maintains, and reinforces the separation of powers boundaries that protect the liberties and voting rights of American citizens. By their very nature, the study of separation of powers focuses on the relationship between the law-making powers of Congress, the powers of the Executive, and the Judicial Power of the United States at the points where there may be "concurrent authority, or in

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission. Letters from the parties consenting to the filing of this brief are on file with the clerk, and counsel of record gave each party's attorney at least ten days' notice of their intent to file this brief.

which its distribution is uncertain." *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) (proposing a judicial approach for defining the boundary between the President and Congress based on a rigorous analysis of the applicable statutory frameworks).

SUMMARY OF ARGUMENT

Article I, Section 1 of the Constitution vests "[a]ll legislative powers herein granted to a Congress of the United States". . Three of those exclusive legislative powers are implicated in this case: "to lay and collect taxes", Art. I §8 cl.1; to authorize and appropriate funds drawn from or owing to the Treasury, Art. I §9, cl. 7 and "to dispose of and make all needful rules and regulations respecting ... property belonging to the United States." Art. IV §3, cl. 4.

At issue in this case is the exclusive power of Congress to determine how over $855 billion in tax funds will be collected, allocated, and spent. PPACA includes $726 billion in direct outlays and a reduction in revenues of $129 billion for the "premium assistance tax credits" at issue here. "Patient Protection and Affordable Care Act, Pub L. 111-148, 124 Stat 119, (2010). Congressional Budget Office, "Updated Estimates of the Effect of the Insurance Coverage Provisions of the Affordable Care Act, April 2014", at 9 & n. 14. [hereafter CBO April 2014 Estimates].

The central issue in this case is the locus of power to define a taxpayer's eligibility to participate in the

"premium assistance credit amount" calculated under 26 U.S.C. § 36(B)(b)(2-3), and hence, control over approximately the approximately $129 billion the CBO estimates is the cost in revenue foregone as a result of that credit. This Court must choose: Either Congress defines eligibility, or the Executive Branch does.

The Fourth Circuit held that the only reasonable construction of PPACA is that Congress *necessarily* gave the IRS the power to open the Treasury's funding spigots wide enough to "ensur[e] that this essential component [the tax credit] exists on a sufficiently large scale" to fund the national health insurance subsidy program envisioned by the Respondents. *King v. Burwell*, 759 F.3d 358, 375 (4th Cir. 2014) [hereafter "*King*"]. Because "Congress' central purpose in enacting the Act [was] to radically restructure the American health care market with 'the most expansive social legislation enacted in decades[,]'" ... "[Petitioners'] 'literal reading' of the premium tax credits calculation subprovision" renders the entire Congressional scheme nonsensical. *Cf.* Maj. Op. at 372." *Id.*, 759 F.3d at 378-379 (Davis, J. concurring).

Your *Amici*, by contrast, argue that the eligibility criteria Congress provided in Section 1311 (42 U.S.C. § 18031) for "premium assistance tax credits" are both clear *and* tightly-integrated into the fabric of the cooperative State/federal program that became PPACA. If the credit is administered as Congress wrote it, the amounts flowing from the Treasury will necessarily be smaller than Respondents might prefer, but only because fewer States exercised the

options that Congress gave them in PPACA. This is neither "absurd" nor "nonsensical". It's the law Congress wrote.

If, by contrast, the Respondents are permitted to administer the tax credit *as the IRS rewrote it*, PPACA "as administered" looks a lot more like the "national" health insurance program that Congress rejected. The IRS is given authority to *administer* the Code, not to rewrite it. So, even if the Fourth Circuit is correct that there is a "tension" between what Congress wrote and what Respondents believe it must have "intended", the scope of IRS interpretive authority cannot extend to altering eligibility criteria for the "premium assistance credit amount". IRS authority extends to interpretations in aid of its power to make "inquiries, determinations, and assessments" of the taxes Congress "imposes" and the credits it "allows"

The language and structure of PPACA confirm that Congress used its power to reduce the federal share of the costs. It did so by enacting 1) grants to induce states to create and administer "American Health Benefit Exchanges", 2) tax credits and Medicaid expansion to induce participation by those who could not otherwise afford to participate in the Exchanges (the "unable"); 3) "shared responsibility" tax payments to ensure that "unwilling" individuals and employers participate; and 4) penalty provisions to induce States to participate in the Medicaid expansion. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, – U.S. –, 132 S.Ct. 2566, 2614-15 (2012) (Ginsburg, Breyer, Sotomayor & Kagan, JJ, concurring and dissenting) (referencing "the large number of U.S.

residents who are unable or unwilling to obtain health insurance.") [hereafter *NFIB*].

Your *Amici* respectfully submit that *no* provision of the Internal Revenue Code delegates the power to grant or withhold tax credits under *any* circumstances. For the IRS to arrogate that power to itself and then claim *Chevron* deference to that power-grab violates Congress' power over the purse and allocation of monies due and owing the Treasury. Congress *alone* has the power to decide what taxes will be imposed, what credits will be allowed and for whom, how they will be calculated and collected, and the uses to which tax revenues will be put.

ARGUMENT

I. THE IRS RULE VIOLATES THE APPROPRIATIONS CLAUSE OF ARTICLE I.

Article I, Section 9, Clause 7, provides:

> No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

This language is plain and has been faithfully observed since 1787. Until the IRS unilaterally decided to extend tax credits to taxpayers ineligible to receive them, the Appropriations Clause has governed the conduct of our government and serves as the clearest of the boundaries between the powers of the legislative branch and those vested in the executive and judicial branches.

A. PPACA is an Appropriations Act.

By its own terms, PPACA appropriates money. Like many other appropriations acts, it says in so many words what it is appropriating money for and what it is not appropriating money for. In explicit terms it says that "there shall be allowed as a credit against the tax imposed by this subtitle for any taxable year an amount equal to the premium assistance credit amount of the taxpayer for the taxable year." 26 U.S.C. § 36B(a). It limits eligibility for that premium assistance credit to taxpayers who are "enrolled in through an Exchange established by the State under [section] 1311 of the Patient

Protection and Affordable Care Act" 26 U.S.C. § 36B(b)(2).

The IRS response to commentary that its decision to extend tax credits to Exchanges that were *not* "established by the State under [section] 1311" was illegal concedes that the disputed credits were not *explicitly* authorized by this appropriation language:

> The statutory language of section 36B and other provisions of the Affordable Care Act *support the interpretation* that credits are available to taxpayers who obtain coverage through a State Exchange, regional Exchange, subsidiary Exchange, and the Federally-facilitated Exchange. Moreover, the relevant legislative history does not demonstrate that Congress intended to limit the premium tax credit to State Exchanges. Accordingly, the final regulations maintain the rule in the proposed regulations because it is consistent with the language, purpose, and structure of section 36B and the Affordable Care Act as a whole.

77 Fed.Reg. at 30,378 (emphasis added).

B. The IRS has no Statutory Authority "To Lay ... Taxes" or "To Allow" Credits.

26 U.S.C. § 6201 (2014), embodies the fundamental distinction between the power to "lay and collect taxes", which belongs only to Congress, and the administrative power to "assess" them once the necessary inquiries and calculations have been

made: "The Secretary is authorized and required to make the inquiries, determinations, and assessments of all taxes ... *imposed by this title* ...." (emphasis added).

The Fourth Circuit "permits the IRS to decide whether the tax credits [will] be available on federal Exchanges." *King*, 759 F.3d at 373. The IRS justifies its rule on the theory that "the relevant legislative history does not demonstrate that Congress intended to limit the premium tax credit to State Exchanges." 77 Fed.Reg. at 30,378.

Both the panel and the IRS are asking the wrong question. The issue is not "whether Congress intended to limit the premium tax credit to State Exchanges", but whether Congress has delegated power to grant or withhold tax credits to the Executive Branch here. Your *Amici* submit that it has not done so.

By "deferring" to an action that finds no support in *any* section of the Internal Revenue Code, the Fourth Circuit has validated the IRS' naked assertion of congressional power to spend the approximately $36 billion necessary to fund the tax credits it has authorized. *See* CBO April 2014 Estimates, *supra*. *Compare*, *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 109 S.Ct. 1726 (1989).

There can be no dispute that the regulation promulgated by the IRS draws money from the Treasury, and expands the pool of taxpayers subject to the individual mandate to include those who are eligible to participate in the Medicaid expansion. It thus revises how taxes are collected under PPACA.

That it appropriates money "by Law", however, is a proposition that must be denied. "By Law" refers to the legislative power, *all* of which is vested by Article I, Section 1, in the Congress. The IRS regulation is not, of course, an appropriations bill and therefore cannot constitutionally draw money from the Treasury, determine *from whom* taxes will be collected, or determine how they will be calculated.

C. The IRS Rule is a "Revision" of Section 36B not an "Interpretation"

The position of the Fourth Circuit can be paraphrased thus:

> Congress appropriated the money to subsidize tax credits payable to citizens "enrolled in one or more qualified health plans through an Exchange ... established by the State under [section] 1311" It also anticipated that the States might not cooperate, and so authorized the Secretary of HHS to create Exchanges on their behalf. Because the Executive views the subsidies as an essential part of the national program PPACA was intended to create, "it makes sense to read" the Act to authorize the tax expenditures, 759 F.3d at 369, and thereby to trigger the individual and employer mandates in those States.
>
> The appropriation already made by Congress for Exchanges "established by the State under section 1311" now operates without the restrictions

> embedded in PPACA, funds enrollees who are not eligible, and imposes the mandate on citizens whose States refused to set up Exchanges.

To call the IRS rationale for its rule "an interpretation" stretches the meaning of the term. Congress has many ways to expresses its "intent" concerning the source, amounts, and purposes of authorized appropriations. Section 1311 of ACA, for example, explicitly appropriates funds

> ... to the Secretary, out of any moneys in the Treasury not otherwise appropriated, an amount necessary to enable the Secretary to make awards, not later than 1 year after the date of enactment of this Act, to States in the amount specified in paragraph (2) for the uses described in paragraph (3).

PPACA also withholds Congressional consent by the use of several *explicit* negatives on expenditures. E.g., Section 1311 D(5)(A) (s: "Funding Limitations.— (A) No Federal Funds For Continued Operations"); Section 4101(A)(4) ("No funds provided under a grant awarded under this section shall be used for expenditures for personnel or to provide health services.").

Whether appropriations language is directive or negative, *any* actions inconsistent with that language constitute a drawing from the Treasury. A directive to spend for a specified purpose cannot be converted by regulatory "interpretation" into an authorization to spend for something more or

something different. Nor can a refusal to draw be made into a mandate to draw by "interpreting" the condition.

Both the IRS and the Fourth Circuit treat the eligibility criteria for subsidized health care as simply one element of a Congressional effort to subsidize as many people as possible. The appropriations language in PPACA, however, is not "aspirational"; it sets forth in great detail who is eligible for a tax credit and who is not. Both the IRS and the Fourth Circuit panel concede that a literal reading of Section 1311 limits the appropriation that subsidizes the insurance of eligible individuals. The literal reading of Section 1311 is confirmed by the operational details of the employer mandate, which is enforced by imposing assessable tax payments on large employers that have at least one employee enrolled in a plan, offered through an Exchange, for which "an applicable premium tax credit ... is allowed or paid." See 26 U.S.C. § 4980H(a-b). Congress imposed an extremely burdensome tax not only to recoup its expenditures, but also to ensure compliance with the mandate itself.

D. The IRS Rule is Unconstitutional

As written, PPACA authorizes taxation of individuals and businesses as well as the expenditure of money if, *and only if*, their elected representatives agree to participate in the State-federal experiment that is PPACA. The IRS rule at issue here is constitutionally defective in three ways: 1) it appropriates and directs the flow of federal money without authorization; 2) it imposes taxes

that are not authorized by law; and 3) it seeks to validate regulatory authority not granted by law.

In *NFIB*, *supra*, this Court confirmed that the validity of PPACA's individual and employer mandates rests on Congress' power to tax and spend. It follows inexorably from this holding that the *manner* in which Congress employed those powers in Sections 1311 and 26 U.S.C. § 4980H(a)-(b) is the source of whatever "assessment" and regulatory powers the IRS claims in this case.

The Fourth Circuit's resort to "*Chevron* deference" in an appropriations case is singularly inappropriate. The inviolable and exclusive power of the purse is one that touches on everything that Congress does. To tamper with that exclusive power is to tamper with the very essence of constitutional, representative government. Unless Congress is simply to become a mere bookkeeper or ATM machine for the Executive Branch, this Court should reaffirm that such delegation must "explicitly reflect[] Congress' intention." *Mid-America Pipeline*, *supra*, 109 S.Ct. at 1734,

So clearly has this principle been understood that some of the harshest language ever used to describe a violation of the separation of powers has been used with respect to the problem we see here: judicial deference to an unconstitutional assertion of the appropriations power reserved for Congress.

In *Federalist*, No. 58, James Madison emphasized the scope of the appropriations power:

> The House of Representatives cannot only refuse, but they alone can propose

> the supplies requisite for the support of government. They, in a word, hold the purse- ... This power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure."

THE FEDERALIST No. 58 at 380 (Modern Library ed.) (J. Madison). In FEDERALIST, No. 78, Hamilton was equally adamant:

> The legislature not only commands the purse but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over the sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active resolution whatever.

Id. at 504.

Whenever the issue has been raised, this Court has concluded that an appropriation by Congress is required before moneys may be drawn from the federal Treasury. Knote v. United States, 95 U. S. 149 (1877); Austin v. United States, 155 U. S. 417 (1894); Hart v. United States, 118 U. S. 62 (1868); Reeside v. Walker, 52 U. S. (11 How.) 623 (1850). *See also* Cincinnati Soap Co. v. United States, 301 U. S. 308 (1937); United States v. Lovett, 328 U. S. 303 (1946). *See also* Ronald D. Rotunda & John E.

Nowak, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE (West Pub. Co. 5th ed. 2013), vol. 1, §§ 5.7(a)(iv) & 7.6(b), and vol. 6, §23.8

> The object is apparent upon the slightest examination. It is to secure regularity, punctuality, and fidelity, in the disbursements of the public money. As all the taxes raised from the people, as well as revenues arising from other sources, are to be applied to the discharge of the expenses, and debts, and other engagements of the government, it is highly proper, that congress should possess the power to decide how and when any money should be applied for these purposes. If it were otherwise, the executive would possess an unbounded power over the public purse of the nation; and might apply all its moneyed resources at his pleasure. The power to control and direct the appropriations, constitutes a most useful and salutary check upon profusion and extravagance, as well as upon corrupt influence and public peculation....

J. Story, 2 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1348 (3d ed. 1858), *quoted in Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 427, 110 S. Ct. 2465, 2473 (1990).

In *Reeside v. Walker, supra,* the estate of James Reeside sought and won a set-off of its claims against those of the United States. The jury found that the government was, in fact, indebted in the amount of $188,496.06. In an attempt "[t]o save future expense and litigation in [the] case, with a view to obtain[ing]

the desired judgment" this Court articulated the clear and unambiguous rule that a court may not order or authorize the Treasury to pay out unappropriated moneys:

> No officer, however high, not even the President, much less a secretary of the treasury or treasurer is empowered to pay debts of the United States generally, when presented to them. ... It is a well-known constitutional provision, that no money can be taken or drawn from the treasury except under an appropriation by congress. See Constitution, Art. I, § 9, I Stats. at Large, 15.
>
> However much money may be in the treasury at any one time, not a dollar of it can be used in the payment of any thing not thus previously sanctioned. Any other course would give to the fiscal officers a most dangerous discretion.
>
> Hence, the petitioner should have presented her claim on the United States to congress, and prayed for an appropriation to pay it. ... But without such an appropriation it cannot and should not be paid by the treasury, whether the claim is by a verdict or judgment, or without either, and no *mandamus* or other remedy lies against any officer of the treasury department, in a case situated like this, where no appropriation to pay it has been made. 52 U. S. (11 How.) 626-28 (emphasis by the Court).

Thus, even in the face of a binding obligation, judgment, or unconstitutional withholding, no court may order the funds to be paid where payment is not authorized by Congress. Stitzel-Weller Distillery v. Wickard, 118 F. 2d 19 (1941); Collins v. United States, 15 Ct. Cl. 22 (1878); Doe v. Matthews, 420 F. Supp. 865 (D. N. J. 1976). *See also* Cincinnati Soap Co. v. United States, 301 U. S. 308 (1937); Spaulding v. Douglas Aircraft Co., Inc., 60 F. Supp. 985 (S. D. Cal. 1945).

Nor may a court modify a condition attached to an appropriation. *United States v. Lovett, supra,* was a challenge to an appropriations measure that provided that certain named government employees not be paid their salaries unless Congress confirmed their continued employment. The three named individuals continued to work despite the limitation and sued for their compensation. The Court of Claims held that the claimants were entitled to their money, but did not entertain the illusion that it could order the Treasury to pay, or the Congress to appropriate:

> Congress, by enacting Section 304, did not foreclose itself from thereafter appropriating for the payment of these salaries. Congress even now *may* appropriate, and authorize a selected disbursing agency to pay them. Claims therefor, presented to Congress, *may* be satisfied by an appropriation to pay them, as claims. Judgments, recovered here, *may* be satisfied by any appropriation out of which the judgments *may* be by Act of Congress, payable."

Lovett v. United States, 66 F. Supp. 142, 147 (Ct. Cl. 1945) *affirmed on other grounds, United States v. Lovett,* 328 U. S. 303 (1946). (emphasis supplied). This Court affirmed, but held the salary prohibition an unconstitutional bill of attainder, but made no order to appropriate or pay the funds.

In *Office of Personnel Management v. Richmond*, 496 U.S. 414, 424, 110 S.Ct. 2465, 2471 (1990), this Court rejected a federal retiree's claim for benefits because "...Congress has appropriated no money for the payment of the benefits respondent seeks, and the Constitution prohibits that any money 'be drawn from the Treasury' to pay them." *Id*, 496 U.S. at 424, 110 S.Ct. at 2471.

In the present case, Respondents argue this Court should "defer" to their understanding of Congressional intent regarding this appropriation. The Appropriations Clause, Art. I §7, cl. 9, requires more: namely, an explicit authorization to "allow" the tax credit authorized in Section 1311 to purchasers in the federal exchange.

II. VOIDING THE IRS REGULATION DOES NOT LEAD TO ABSURD RESULTS OR TO FRUSTRATION OF CONGRESSIONAL DESIGN

The Fourth Circuit deferred to the IRS because it agreed that "the economic framework supporting the Act would crumble if the credits were unavailable on federal Exchanges". It worried that "without an exception to the individual mandate, millions more Americans unable to purchase insurance without the credits would be forced to pay a penalty that Congress never envisioned imposing on them. *King*,

759 F.3d at 375. It held that Petitioners' "literal" construction of Section 1311 would cause "the broad policy goals of the statute" to be frustrated and "render[] the entire Congressional scheme nonsensical." *Id.*, 759 F.3d at 373 (panel opinion); 378 (Davis, J., concurring).

A. Congress Authorized and Encouraged the States and the District of Columbia to Create Fifty-One (51), Independent "American Health Benefit Exchanges"

PPACA envisions a health insurance market where the federal government provides baseline coverage and access standards, startup grants for State Exchanges and substantial subsidies for taxpayers who cannot afford health insurance. The States, in turn, create and sustain a federally-approved Exchange in which their citizens can shop, provide for its long-term financing, regulate the local insurance market and, most importantly for present purposes, share the costs of subsidies for the poor. *See, e.g.*, Section 1332(a)(3) (42 U.S.C. § 18052(a)(3) (providing for "pass through of funds" *directly to the State* in cases where, "due to the structure of the State plan, individuals and small employers in the State would not qualify for the premium tax credits, cost-sharing reductions, or small business credits under sections 36B of the Internal Revenue Code of 1986)"(emphasis added).

In keeping with the adage that "all politics is local", so too are the Exchanges. Citizens cannot purchase "qualified health plans" interstate unless their States have entered into a regional compact. *See* PPACA §§ 1311(b)(1-2),(f); 1331(c)(3)(A);

1333(a)(1-3). See Patient Protection and Affordable Care Act, Pub L. 111-148, §§1311(b)(1-2),(f), 124 Stat 119, 173-74 (2010) (codified as amended at 42 U.S.C. § 18031 (2012)).

At least for now, the economics of each "American Health Benefits Exchange" turn on the extent to which each State's "unable" and "unwilling" citizens participate in its Exchange, the health and demographics of the State's population and its medical costs.

Each "American Health Benefits Exchange" stands on its own feet. Each looks *inward* as it carries out Congress' command that "*[e]ach State shall* seek to coordinate the administration of, and provision of benefits under, *its* program under this section with the *State* Medicaid program under title XIX of the Social Security Act, the *State* child health plan under title XXI of such Act, and other *State*-administered health programs to maximize the efficiency of *such* programs and to improve the continuity of care." PPACA §1331(c)(4) (codified as amended at 42 USC § 18051 (2012)). (emphasis added).

Thus, even if the "American Health Benefits Exchanges" created by 15 States and the District of Columbia are the *only* ones operating in the foreseeable future, nothing that the other 35 States do will affect their operational success or failure.

B. Congress Sought to Partner with the States to Create, Finance, and Sustain a Vast Social, Economic, and Medical Experiment

In operation, PPACA is an ongoing social and economic experiment. "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (Brandeis & Stone, JJ. dissenting).

It is far too early *for anyone* – especially a federal judge – to speculate about the impact that the operations of the 16 operational, State-created Exchanges will have on a future Congress and the legislatures of the remaining 35 States. All we know for certain is that each "American Health Benefits Exchange" sits on its own bottom. The operations of each Exchange will generate exabytes of valuable economic, social, demographic, and medical data that must be reported to the Secretary on a regular basis. *See, e.g.*, Sections 1002 (establishing certain data collection mechanisms); 1502 (individual coverage reports); 3015 (establishing a nationwide data collection framework). *See generally, e.g.*, Jim Golden, "Innovating on the Obamacare Data Platform," FORBES (July 1, 2012) at http://www.forbes.com/sites/jimgolden/2012/07/01/innovating-on-the-obamacare-data-platform/ (accessed Dec. 19, 2014); Ken Congdon, Editorial, "Obamacare's Big Data Opportunity", HEALTH IT OUTCOMES (May 1, 2013) at http://www.healthitoutcomes.com/doc/obamacare-s-big-data-

opportunity-0001 (accessed Dec. 20, 2014); Kelly Kennedy, "Analysis of Huge Data Sets will Reshape Health Care," *USA Today* (Nov. 24, 2013) at http://www.usatoday.com/story/news/nation/2013/11/24/big-data-health-care/3631211/ (accessed Dec. 21, 2014).

C. The Text of PPACA Presupposes "Voluntary" Participation by the States as the Primary Means by which to Create Viable, State-specific Insurance Pools Large Enough to Cover the Uninsured.

PPACA is structured as a tax and transfer payments program for a reason. A program of "near-universal" health insurance requires both voluntary and involuntary transfers of vast sums of money. PPACA thus has three key components: 1) Medicaid expansion to cover those unable to pay for insurance and penalties for States that were unwilling to participate in the proposed expansion; 2) individual and employer mandates for those who can afford insurance, but who would be unwilling to participate in the absence of a mandate; and 3) federal and state subsidies to reduce startup costs and premiums for lower-income participants.

1. Medicaid Expansion: Insuring the "Unable"

One of the main political problems Congress faced was how to finance an effort designed to create "near-universal" coverage. The first component of that effort was Medicaid expansion. Its goal was twofold: 1) to ensure that Medicaid (itself a cooperative State/federal program) offered the "minimum essential coverage"; and 2) to extend

coverage to persons at or below 133% of the federal poverty line. PPACA §§ 2001(a-b), codified as amended at 42 U.S.C. § 1396a (2012). Although States were given the "option" to participate, Congress was so concerned that they expand both eligibility and minimum essential services that it threatened them with the loss of *all* Medicaid funding as the condition for non-participation. 42 U.S.C. § 1398c, *held unconstitutional as applied in* NFIB, 132 S.Ct. at 2607.

2. Expanding the Pool: Subsidies and Mandates in "American Health Benefit Exchanges"

An "American Health Benefit Exchange" is "a governmental agency or nonprofit entity that is established by a State" that makes "available qualified health plans to qualified individuals and qualified employers" PPACA §§ 1311 (b, d). Like the federal Exchange contemplated under Section 1321(c) and the State-operated Exchanges operating before January 1, 2010 referenced in Section 1321(e), an Exchange is also a "mechanism, including an Internet website, through which a resident of any, or small business in, State may identify affordable health insurance coverage options in that State". Whether created by a State or the Secretary, an Exchange "shall, to the extent practicable, provide ways for residents of, and small businesses in, any State to receive information on" a detailed list of coverage options. PPACA §§1103(a)(1-2), 1311(d)(3).

This is where the similarities end. An Exchange "*created by the State under* Section 1311" is *also* a cost- and power-allocation mechanism. Without this

distribution of power and fiscal responsibility, there would be no basis on which to justify the use of the word "Affordable" in the title of PPACA.

a. Cost-sharing & reduction requirements

Section 1311 is, at bottom, a massive attempt to induce the States and those who are unwilling to participate in the individual or group markets to share the cost of near-universal health insurance. *See* PPACA §§ 1501(C-D) (codified as amended at 42 USC § 18091 (2012)) (individual and employer mandates).

Section 1101, for example, conditions a State's eligibility to participate in the temporary, federal high-risk pool: "To be eligible to enter into a contract with the Secretary under this subsection, a State shall agree *not to reduce the annual amount the State expended* for the operation of one or more State high risk pools during the year preceding the year in which such contract is entered into." Section 1101(b)(3) (codified as amended at 42 U.S.C. § 18001 (2012)) (emphasis added).

Section 1311(d)(3)(B)(i) expressly permits States to "require that a qualified health plan offered in such State offer benefits in addition to the essential health benefits specified under section 1302(b)", but requires that any State electing to do so "defray the cost of any additional benefits described in clause (i)." Section 1311(d)(3)(B)(ii) (codified as amended at 42 U.S.C. § 18031 (2012)).

Section 1311(d)(5) embodies the same fiscal line-drawing: "In establishing an Exchange under this section, the State shall ensure that such Exchange is

self-sustaining beginning on January 1, 2015, including allowing the Exchange to charge assessments or user fees to participating health insurance issuers, or to otherwise generate funding, to support its operations."

Congress had a very good reason for making American Health Benefits Exchanges *"created by the State under Section1311"* the only "Exchange" on which to obtain subsidized health insurance: The States that create them bear a substantial share of program and administrative costs.

It is not at all unusual for the federal government to provide carrots (and sticks) to incentivize State participation in new domestic programs or regulatory efforts. *See, e.g., South Dakota v. Dole*, 483 U.S. 203 (1987) (grant of federal highway funds contingent on setting 21 as drinking age). The original Medicaid program was opened to State participation in 1965, but seventeen (17) years elapsed before all the States signed on. Kaiser Commission on Medicaid and the Uninsured, *A Historical Review of How States Have Responded to the Availability of Federal Funds for Health Coverage* (August 2012) at http://kaiserfamilyfoundation.files.wordpress.com/2013/01/8349.pdf (accessed Dec. 12, 2014).

Even when States have been *required* to respond, some took years. "The 1987 amendments to Clean Water Act required states to establish quantitative Water Quality Criteria for several dozen toxic pollutants .... Both EPA and the states were slow to respond to this mandate, and it took until 1992 for EPA to certify that 43 states had met these

obligations and to promulgate federal standards for the 14 remaining states." Rena I. Steinzor, *Devolution and the Public Health*, 24 HARV. ENVTL. L. REV. 351, 383 n. 127 (2000) (citations omitted).

b. Power-allocation

The text and structure of PPACA also bear witness to congressional efforts to ensure that both willing and unwilling States would participate in its efforts to restructure the State insurance markets.

There are commands and "offers that cannot be refused". *Compare, e.g.*, Section 1311(b,d), 42 U.S.C. § 18031(b,d) (2014) ("Each State shall, not later than January 1, 2014, establish an American Health Benefit Exchange ... for the State") *with* 42 U.S.C. § 1398c (providing for loss of *all* Medicaid funding as the condition for non-participation), *held unconstitutional as applied in* NFIB, 132 S.Ct. at 2607.

PPACA expressly preempts some State laws and preserves the validity of others. *Compare, e.g.*, Sections 1001(e)(minimum federal standard for summaries of benefits) and 4206(d)(rule of construction for "State or local law" dealing with nutrient content disclosures) *with, e.g.*, Sections 1303(c)(1) (preserving State abortion laws); 1311(d)(preserving State laws "that do[] not prevent the application of the provisions of this title"); 2709(h) (preserving additional State standards governing clinical trials). Sections 1311(f)(1) and 1331(c)(3)(B) permit State-created exchanges to operate interstate or regionally if "each State in which such Exchange operates permits such operation", and Sections 13111(f)(3)(A-B) permit

States to sub-contract with qualified entities "to carry out 1 or more responsibilities of the Exchange."

Congress also drew careful lines that deal specifically with the situation presented here. When a State either does not "elect" to create an Exchange under Section 1311(b), 42 U.S.C. § 18031(b) , or fails to meet federal requirements, the Secretary is indeed authorized to "establish and operate such Exchange within the State". Section 1321(c)(1)(A-B), 42 U.S.C. §18041(c)(1)(A-B) (2014). Her authority in that context is expressly limited by Section 2736(b) of the Public Health Services Act, 42 U.S.C. § 300gg-22(b), which allows her to regulate the conduct of health insurers "relat[ing] to the issuance, sale, renewal, and offering of health insurance coverage in connection with group health plans or individual health insurance coverage in such State."

D. Changing the Rules after the Fact

Contemporaneous agency interpretations of PPACA also confirm that the Secretary's authority is limited to *running* the market-making and administrative aspects of an Exchange.

PPACA was signed into law on March 23, 2010. Respondents HHS and IRS circulated numerous, contemporaneous, internal memoranda about implementation. Correspondence referring subsidies for plans purchased through a federal Exchange begins to appear in March 2011, when "IRS and Treasury personnel noticed the lack of statutory language authorizing tax credits in federal exchanges." Joint Staff Report, U.S. House of Representatives, 113th Cong., "Administration Undertook Flawed Analysis of Key Issues Prior to

Expanding Health Law's Taxes and Subsidies" (Feb. 5, 2014) 4 at http://oversight.house.gov/wp-content/uploads/2014/02/IRS-Rule-OGR-WM-Staff-Report-Final1.pdf (accessed Dec. 23, 2014) [hereafter Joint Staff Report].

It was not until November, 2011 that HHS began to eliminate references to subsidies and State-operated Exchanges in the "Boilerplate Cooperative Agreement" prepared by HHS. Indeed Mark Mazur, Assistant Secretary of the Treasury for Tax Policy admitted in a letter to House Oversight and Investigations Committee Chair Daryl Issa that he "never saw any analysis of the issue prior to May 2012." Joint Staff Report, *supra*, at 6 at http://oversight.house.gov/wp-content/uploads/2014/02/IRS-Rule-OGR-WM-Staff-Report-Final1.pdf (accessed Dec. 23, 2014).

Among other significant indicators that Respondents understood that subsidies are *not* legally available on the federal Exchange is that Respondents did not contract for a health care calculator on HEALTHCARE.GOV until well into May, 2012. If Respondents really believed that subsidies would be available, they omitted *the* essential tool that participants need to sign up for subsidies. *See* Scott Vorse, "Beyond Gruber: How HHS Flip-Flopped on Federal Exchange Subsidies," (Competitive Enterprise Institute WEBMEMO 28, Nov.20, 2014) at https://cei.org/content/beyond-gruber-how-hhs-flip-flopped-federal-exchange-subsidies (accessed Dec. 21, 2014).

This is the problem that the Respondents tried to "fix" with the regulation at issue here. It is also why

the IRS regulation does far more than "mak[e ...] rules to fill any gap left, implicitly or explicitly, by Congress" in PPACA. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, 104 S.Ct. 2778 (1984).

It is thus fair to assert that the IRS rule at issue here is not simply a matter of tax administration designed to fill "gaps" in the Internal Revenue Code like those in *Mayo*. Rather, this rule changes a fundamental feature of a massive tax statute, opens the Treasury for unappropriated and unauthorized tax expenditures, and changes the legal obligations of individuals and employers residing in states that did not establish their own Exchanges.

In short, Respondents have rewritten the law in a manner fundamentally at odds with the cooperative federal-state relationships on which the economics and politics of PPACA rests. Under Chevron, this is fatal.

E. The Legal Fiction that the Federal Government "Acts *on Behalf of the State*" Violates PPACA and other Federal Laws.

By holding that "the federal government acts *on behalf of the state* when it establishes its own Exchange", *King*, 759 F.3d at 369 (emphasis added), the Fourth Circuit created what it thought was a useful legal fiction. There is nothing in PPACA, however, that authorizes Respondents to serve as fiduciaries "on behalf of" the States that do not create Exchanges, or authorizes them to serve "in the shoes of" the non-participating States. Under *Chevron*, this is fatal.

This fiction also creates two possibilities expressly forbidden by federal law. The first is a situation in which the federal government would assume, *in perpetuity*, the *entire* range of costs that would be incurred during the operations of an "Exchange created by a State under Section 1311". Although Section 1311(a)(3) provides for renewable federal assistance "for activities (including planning activities) related to *establishing* an American Health Benefit Exchange" (emphasis added), Section 1311(d)(5) confirms that "no federal funds for continued operations" are either authorized or appropriated "for continued operations"

The Fourth Circuit also implicitly authorizes the Secretary to embark on a course of conduct that would illegally "augment [HHS] appropriations." By "charg[ing] assessments or user fees to participating health insurance issuers, [or] otherwise generat[ing] funding, to support its operations", the Secretary would acquire funding source outside congressional control. *See* General Accounting Office, Office of the General Counsel, "The Augmentation Concept", 6 GAO-RB pt. E, §1 (G.A.O.), 2006 WL 6179178 (February, 2006) ("As a general proposition, an agency may not augment its appropriations from outside sources without specific statutory authority .... Restated, the objective of the rule against augmentation of appropriations is to prevent a government agency from undercutting the congressional power of the purse by circuitously exceeding the amount Congress has appropriated for that activity.").

If State law permits, States or the non-profit organization they establish to run the Exchange can make money on operations. Nothing in PPACA prohibits that result. A State can "offer benefits in addition to the essential health benefits specified under section 1302(b)" if it pays for them with its own money.

The Secretary, however, can do neither of these things. Federal money is controlled by Congress. There is nothing in PPACA that authorizes the federal government to "offer benefits in addition to the essential health benefits specified under section 1302(b)", or to impose their cost on the States in which federal exchanges operate under Section 1321.

The more natural reading of Sections 1311 and 1321(c) – and the reading most consistent with the "plain language" requirement of Section 1311(e)[2] – is that when a State fails to set up an "American Health Benefits Exchange" or fails to win approval of the Exchange that it has created, the Secretary must set up a federal exchange within the boundaries of that State. Her authority, however, would be limited

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[2] Section 1311(e)(3)(B) is not directly applicable here, but it does require an "American Health Benefits Exchange" (i.e. one "established by the State") to use "plain language" in its dealings with the public. "Plain language" is defined as "language that the intended audience, including individuals with limited English proficiency, can readily understand and use because that language is concise, well-organized, and follows other best practices of plain language writing." The IRS and Fourth Circuit would have done well to follow this approach when interpreting PPACA.

to creating and regulating *a marketplace* "through which a resident of any, or small business in, State may identify affordable health insurance coverage options in that State" that are consistent with PPACA, and "provid[ing] ways for residents of, and small businesses in, [that] State to receive information" on the options available to them in that State's market, Medicaid, Social Security, high-risk pools (if any), and other possible purchasing or entitlement options. PPACA §§1103(a)(1-2), 1311(d)(3). Lest there be any doubt about the limits on that authority, it is resolved by the reference in Section 1321(c)(2) to Section 2736(b) of the Public Health Services Act, 42 U.S.C. § 300gg-22(b), which limits that power to oversight of "the issuance, sale, renewal, and offering of health insurance coverage in connection with group health plans or individual health insurance coverage in such State."

Only Congress can "fix" problems such as these. It has done so in the past[3], and should this Court invalidate the IRS rule, Congress will undoubtedly respond.

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[3] Some were technical corrections, *see, e.g.*, Health Care and Education Reconciliation Act of 2010, Pub.L. No. 111–152, 124 Stat. 1029 (2010), while others were financially unworkable. *See, e.g.*, Pub.L. No. 112–240, 126 Stat. 2313, §642 (January 2, 2013) (repealing the "CLASS Act", PPACA §§8001-8002, and rescinding related spending authority); Pub.L. No. 112-9, 125 Stat. 36 (2011) (repealing the "1099 Mandate"); Pub.L. No. 112-56, 125 Stat. 111 (2011) (repealing withholding requirement and amending 26 U.S.C. §36B to change the calculation of adjusted gross income for determining eligibility for certain programs).

As this Court observed in *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (per curiam): "Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law." *Accord*, Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 646-47 (1990); MetroPCS Cal., LLC v. FCC, 644 F.3d 410, 414 (D.C. Cir. 2011). Certainly "an agency has no power to "tailor legislation to bureaucratic policy goals by rewriting unambiguous statutory terms." *Utility Air Regulatory Grp. v. EPA*, 124 S.Ct. 2427, 2445 (2014).

F. There is no "Ambiguity" in the Tax Credit "Allowed" by Congress

The Fourth Circuit found an "internal tension" between the text of Sections 1311 and 1321 because "denying tax credits to individuals shopping on federal Exchanges would throw a debilitating wrench into the Act's internal economic machinery." *King*, 759 F.3d at 373-374. It then relied on this "tension" to suggest that Congress *must* have delegated power to confer eligibility for the credit on the IRS: "Given that Congress defined 'Exchange' as an Exchange established by the state, it makes sense to read §1321(c)'s directive that HHS establish 'such Exchange' to mean that the federal government acts *on behalf of the state* when it establishes its own Exchange." *King*, 759 F.3d at 369 (emphasis added); *id.*, 759 F.3d at 377 (Davis, J., concurring) ("the

contingency provision" in Section 1321(c) supports the IRS interpretation).

There is no tension.

A "tension" arises between Sections 1311 and 1321 if, and only if, one assumes that federal tax credits *must* be available to persons "enrolled in one or more qualified health plans through an Exchange established [by the United States] under ... 1321 of the Affordable Care Act." 26 C.F.R. § 1.36B–1(k). While *Amici* can understand the political reasons why Respondents made that assumption, Sections 1311 and Section 1321 do not support it.

From our perspective, Respondents' claims raise two fundamental questions:

1) Can expanding the eligibility criteria of a tax credit validly be characterized as an "interstitial matter" of tax administration? and

2) Assuming that the IRS regulation can be so characterized, is the agency's "interpretation" consistent with the Internal Revenue Code, and "the language, purpose, and structure of section 36B and the Affordable Care Act as a whole"? Health Insurance Premium Tax Credit, 77 Fed. Reg. 30,377, 30,377 (May 23, 2012)

Your *Amici* respectfully submit that the answer to both questions is "no." Because the IRS regulation rewrites the statute, we conclude this section with Justice Brandeis' warning in *Iselin v. United States*, 270 U.S. 245, 251 (1926): "What the government asks is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be

included within its scope. To supply omissions transcends the judicial function." *Accord*, *Michigan v. Bay Mills Indian Community*, 134 S.Ct. 2024, 2034 (2014) ("This Court has no roving license, in even ordinary cases of statutory interpretation, to disregard clear language simply on the view that ... Congress 'must have intended' something broader.").

III. *CHEVRON* DEFERENCE IS INAPPROPRIATE IN THIS CASE

Chevron holds that judicial deference to an agency interpretation is required only when "Congress has not directly addressed the precise question at issue" or if "the statue is silent with respect to the specific issue." *Chevron, U.S.A. v Natural Resources Defense Council, Inc.* 467U.S. 837, 843 (1984) While the lower courts have not been consistent in their understanding of the scope of *Chevron* deference, *all* of the Members of this Court agree that "*United States v. Mead Corp.* requires that, for *Chevron* deference to apply, the agency must have received Congressional authority to determine the particular matter adopted. No one disputes that." *City of Arlington, Texas v. F.C.C.*, 133 S.Ct. 1863, 1873-74 (2013). All Members of this Court also agree that "[t]he agency is due no deference" when "Congress has left no gap for the agency to fill." *City of Arlington*, 133 S.Ct. at 1875 (Breyer, J., concurring); Id., 133 S.Ct. at 1881 (Roberts, C.J., Kennedy & Alito, JJ., dissenting).

A. Under *Chevron*, the Court Decides, as a Matter of Law, whether there is Statutory Ambiguity

The "particular matter at issue" here is eligibility for the "premium assistance credit". If Congress has limited eligibility to taxpayers who enrolled in a qualified health plan through an Exchange "*created by a State under Section 1311*" (42 U.S.C. § 18031) (emphasis added)", no further inquiry is needed. Congress decided.

Because Respondents argued below that PPACA is ambiguous *concerning eligibility*, this Court must decide whether the IRS eligibility rule can validly be characterized as an "interstitial" legal question that "[t]he Secretary is authorized and required" to resolve under his authority "to make the inquiries, determinations, and assessments of all taxes ... imposed by" the Internal Revenue Code. 26 U.S.C. § 6201 (2014).

If the answer is "no" (and we respectfully submit that it is), the Court must then ask whether PPACA delegates Congress' power to "impose" taxes or to "allow" credits against taxes otherwise due and owing the Treasury of the United States.

B. Congress has directly addressed the precise question at issue in this case

Congress has allowed the "premium assistance tax credit" only for taxpayers ...

1) Who are enrolled in a "qualified health plan" that is

2) "offered in the individual market within a State", and
3) whose enrollment was "*through an Exchange established by the State under 1311 of the Patient Protection and Affordable Care Act*".

26 U.S.C. § 36(B)(b)(2)(A) (emphasis added) .

The panel below rejected the "common sense" proposition that 26 U.S.C. §36B [hereafter § 36B) means that "the premium credit amount for individuals purchasing insurance through a federal Exchange would always be zero." *King*, 759 F.3d at 368-69. PPACA "is ambiguous and subject to at least two different interpretations, *id.*, 759 F.3d at 372, *not* because Congress tried and failed to be clear about its intentions, but rather because "denying tax credits to individuals shopping on federal Exchanges would throw a debilitating wrench into the Act's internal economic machinery." *King*, 759 F.3d at 373-374.

1. Respondents' Claim for *Chevron* Deference is Overbroad.

In *Mayo Foundation for Medical Educ. and Research v. U.S.*, *supra*, , the Chief Justice confirmed that the "principles underlying ... *Chevron* apply with full force in the tax context." Id., 562 U.S. at ___, 131 S.Ct. at 713.

The Fourth Circuit held that "[w]hat we must decide is whether the statute *permits* the IRS to decide whether the tax credits would be available on federal Exchanges." *King*, 759 F.3d at 373 (emphasis added). If so, the panel reasoned, "[i]t is thus entirely sensible that the IRS would enact the

regulations it did, making *Chevron* deference appropriate." *Id.*, *King*, 759 F.3d at 375.

Your *Amici* respectfully submit that this is the wrong question. The *Chevron* question is: *Did Congress grant the IRS the authority to determine who is eligible to claim a tax credit under PPACA?*

The answer is "No."

2. IRS Discretion under *Chevron* is Congruent with its Authority to Administer the Tax Laws.

Because *Chevron* requires the reviewing court to determine whether Congress granted the IRS "authority to determine the particular matter at issue in the particular manner adopted", *City of Arlington,* 133 S.Ct. at 1873-74, the analysis of IRS authority must begin with the powers granted to the Secretary of the Treasury. 26 U.S.C. §6201(a) (2014) provides, in relevant part, that:

> The Secretary is authorized and required to make *the inquiries, determinations, and assessments of all taxes* (including interest, additional amounts, additions to the tax, and assessable penalties) *imposed by this title*, ... (emphasis added)

Section 6201 distinguishes between the power to "lay and collect taxes", which belongs only to Congress, and the administrative power of the IRS to make the "inquiries, determinations and "assessments" needed to calculate, assess, and collect the taxes that Congress has imposed. *See* 26 U.S.C. §§6202 (assessment), 6301 (collection) (2014).

So too, we submit, should this Court.

In *Mayo Foundation*, the issue was "whether doctors who serve as medical residents are properly viewed as 'student[s]' whose service Congress has exempted from FICA ...". 131 S.Ct. at 708. *Chevron* analysis was applicable – and deference was warranted – because the "statute does not define the term, 'student,' and does not otherwise attend to the precise question whether medical residents are subject to FICA." Id., 131 S.Ct. at 711. The IRS rule in question sought to clarify "the ter[m]" "student" as used in § 3121(b)(10), particularly with respect to individuals who perform "services that are in the nature of on the job training." *Mayo*, 131 U.S. at 710, *quoting* 69 Fed.Reg. 8605 (2004).

Here, there is no such ambiguity. The statute provides that "there shall be allowed as a credit against the tax imposed by this subtitle for any taxable year an amount equal to the premium assistance credit amount of the taxpayer for the taxable year." 26 U.S.C. § 36B(a). It then limits eligibility for that credit to taxpayers who are "enrolled in through an Exchange established by the State under [section] 1311 of the Patient Protection and Affordable Care Act" 26 U.S.C. § 36B(b)(2).

As noted in Part II(A) above, 16 State Exchanges are operating and more States will undoubtedly join the experiment if the 16 are viewed as successful. This is hardly "nonsensical". King 759 F.3d at 373 (panel opinion); 378 (Davis, J., concurring). The Fourth Circuit therefore had no basis to infer Congressional delegation of interpretive authority to the Respondents.

The IRS was clearly sensitive to the charge that extending tax credits to Exchanges that were *not* "established by the State under [section] 1311" would exceed its authority under the Internal Revenue Code as amended by PPACA. It conceded that this appropriation language does not *explicitly authorize* the disputed credits:

> The statutory language of section 36B and other provisions of the Affordable Care Act *support the interpretation* that credits are available to taxpayers who obtain coverage through a State Exchange, regional Exchange, subsidiary Exchange, and the Federally-facilitated Exchange.

77 Fed.Reg. at 30,378 (emphasis added). It therefore sought refuge in the legislative history:

> Moreover, the relevant legislative history does not demonstrate that Congress intended to limit the premium tax credit to State Exchanges. Accordingly, the final regulations maintain the rule in the proposed regulations because it is consistent with the language, purpose, and structure of section 36B and the Affordable Care Act as a whole.
>
> Id.

The IRS puts the cart before the horse. Even if we ignore the fact that legislative history of PPACA is sparse, and forget that many of its important provisions were compromises struck during "negotiations [that] were held behind closed doors".

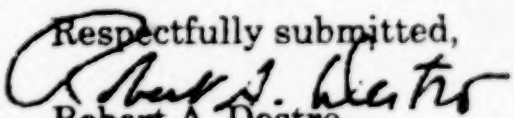
John Cannan, *A Legislative History of the Affordable Care Act: How Legislative Procedure Shapes Legislative History*, 105 LAW LIBRARY J. 131, 159 (2013), *Chevron* deference is available if – and only if – Congress has either explicitly or implicitly given the IRS power to define the class of taxpayers eligible for the tax credit.

It has not done so.

CONCLUSION

The IRS claim of interpretive authority to authorize a tax credit for citizens who live in States that have refused to establish Exchanges is contrary to law and unconstitutional.

Respectfully submitted,



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